No. 25-170

IN THE

Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., *et al.*,

Petitioners,

v.

COUNTY COMMISSIONERS OF
BOULDER COUNTY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF PROFESSOR HILLEL Y. LEVIN AND PROFESSOR TIMOTHY D. LYTTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

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Timothy D. Lytton is Regents' Professor and Professor of Law at Georgia State University and an elected member of the American Law Institute. He specializes in torts, administrative law, and consumer protection law.[2]

Amici take no position on the resolution of Respondents' specific claims in this litigation. Their sole aim in this brief is to argue why the Court need not and should not consider in this case whether federal law precludes state statutory consumer protection claims. That issue bears directly on areas of *amici*'s expertise and scholarship, and *amici* thus have an interest in urging that it is determined only in a case where it is within the scope of the questions presented and has been fully briefed, neither of which describes this case.

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[1] Pursuant to Rule 37.6, no party or counsel for any party authored this brief, either in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *Amici* submit this brief as individuals, not as representatives of their respective universities or the American Law Institute.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past decade, state and local governments across the country have sued oil companies for deceiving consumers regarding the environmental impact of burning fossil fuels. These lawsuits assert two distinct categories of legal claims.

The first category is tort claims seeking relief for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate.[3]

The second category is statutory consumer protection claims seeking remedies for unfair and deceptive marketing practices. Under the statutes enacted by some states, these claims need not assert any damages or seek any relief for the effects of greenhouse-gas emissions on the global climate. For example, some pending claims in this category seek injunctions prohibiting deceptive or unfair practices, disgorgement of funds acquired by oil companies as a result of the challenged practices, statutory civil penalties for engaging in the practices, and awards of investigation and litigation costs.

For two reasons, *amici* urge that, however the Court rules on the question of whether federal law

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[3] We use the term "tort claims" as a shorthand for a variety of common-law and statutory causes of action, including traditional tort claims, such as fraud, negligence, nuisance, trespass, design defect, and failure to warn; derivative torts, such as civil conspiracy and impairment of public trust; and claims for restitution, such as unjust enrichment. We distinguish such "tort claims" from claims under state consumer protection statutes.

precludes state tort claims, it should not address whether federal law precludes statutory consumer protection claims.

I. The Court need not address this question to decide the fate of Respondents' lawsuit against Petitioners. Although Respondents initially asserted both categories of claims in their complaint, the trial court dismissed the statutory consumer protection claims on the pleadings. Neither party appealed that dismissal, and Respondents' statutory consumer protection claims are not presently before the Court. Thus, deciding whether federal law precludes statutory consumer protection claims is not necessary to the disposition of the case. If the Court determines that federal law precludes the remaining tort claims, the lawsuit will be dismissed. If it determines that federal law does not preclude the tort claims, the lawsuit will proceed.

II. The Court ought not address this question because it raises categorically and analytically different issues from those that have been briefed by the parties. The Court accepted certiorari on, and the parties have briefed, "whether federal law precludes state-law claims seeking relief for *injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate*." Because statutory consumer protection claims need not make any such allegations, determining whether they are precluded would require a different analysis than that offered by the parties in this case.

ARGUMENT

I. DISPOSITION OF THIS CASE DOES NOT REQUIRE THE COURT TO ADDRESS WHETHER FEDERAL LAW PRECLUDES STATE CONSUMER PROTECTION CLAIMS FOR DECEPTIVE AND UNFAIR TRADE PRACTICES

Respondents' Amended Complaint included six state-law claims: public nuisance, private nuisance, trespass, unjust enrichment, civil conspiracy, and violation of the Colorado Consumer Protection Act. J.A. 112-136; Pet. App. 50a. The state trial court granted Petitioners' motion to dismiss the consumer protection claim based on inadequate pleading. Pet. App. 133a-136a. Neither party appealed that decision, and consideration of the Respondents' consumer protection claim played no part in the appeal of the trial court's decision to the Supreme Court of Colorado. *See* Pet. App. 3a (explaining that Respondents "assert[], as pertinent here, causes of action for public nuisance, private nuisance, trespass, unjust enrichment, and civil conspiracy"); *id.* at 8a (describing the issue before the court as "the preemptive effect of federal law *on state common law tort claims* for harms related to climate change") (emphasis added).

Petitioners' brief to the Court correctly notes that "[t]he trial court did dismiss respondents' statutory consumer-deception claim for failure to state a claim … and that claim is no longer in the case." Pet. Br. 9. Thus, Petitioners direct their arguments towards Respondents' "state tort law" claims, *id.* at 3, meaning the tort claims that survived the trial court's dismissal order.

In his *amicus* brief in support of Petitioners, Professor Zywicki explains that Respondents' consumer protection claim was dismissed by the trial court, is "not within the scope of the questions presented to this Court," and should not be addressed by this Court because it is neither part of, nor necessary to the disposition of, this appeal. Brief of Prof. Todd Zywicki and the Center for Individual Freedom as *Amici* in Support of Pet. at 3.

We agree.

II. THE COURT SHOULD NOT ADDRESS WHETHER FEDERAL LAW PRECLUDES STATE STATUTORY CONSUMER PROTECTION CLAIMS BECAUSE THIS CATEGORY OF CLAIMS INCLUDES CLAIMS THAT DO NOT SEEK RELIEF FOR INJURIES CAUSED BY GREENHOUSE-GAS EMISSIONS AND, THEREFORE, FALLS OUTSIDE OF THE SCOPE OF THE PRECLUSION ANALYSIS OFFERED BY THE PARTIES IN THIS APPEAL

The question presented in this appeal does not implicate the statutory consumer protection claims that some states have asserted against fossil-fuel companies.[4] The Court should decline to address such claims for two reasons.

First, claims that do not impose liability or demand relief for injuries caused by greenhouse-gas emissions are different in kind from the tort claims now before the Court, and deciding whether federal law precludes them would require an analysis the parties have not briefed and the courts below did not consider.

Second, although some broad statements in Petitioners' brief and an argument pressed by certain *amici* might suggest that such claims are merely repackaged tort claims subject to the same disposition, that suggestion is mistaken.[5]

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[4] In particular, the states of Vermont and Connecticut, the Commonwealth of Massachusetts, and the District of Columbia have sued fossil-fuel companies for violations of their respective consumer protection statutes without any tort claims. *See Conn. v. Exxon Mobil Corp.*, No. HHD-CV20-6132568-S (Conn. Super. Ct. second am. compl. filed Nov. 8, 2024); *Vt. v. Exxon Mobil Corp.*, No. 21-CV-02778 (Vt. Super. Ct. compl. filed Sept. 14, 2021); *Mass. v. Exxon Mobil Corp.*, No. 19-3333 (Mass. Super. Ct. compl. filed Oct. 24, 2019); *D.C. v. Exxon Mobil Corp.*, No. 2020-CA-002892B (D.C. Super. Ct. compl. filed June 25, 2020).

[5] *See* Brief of American Tort Reform Association as *Amicus* in Support of Pet. at 10 ("Some state and local climate change litigation, including the complaint in this case, invoke state unfair or deceptive trade practices statutes . . . . These related claims should not be overlooked by the Court, even when properly dismissed here by the court below. The outcome should be the same . . ."); Brief of Prof. Todd Zywicki and the Center for Individual Freedom as *Amici* in Support of Pet. at 3-4 ("Climate-related UDAP claims are rooted in the same facts, allege the same bases for injury, and arise from the same circumstances as the parallel tort theories, and plaintiffs typically raise them in

A. Statutory Consumer Protection Claims May Seek Relief for Harms Other than Greenhouse-Gas Emissions, and Require a Different Preclusion Analysis than Tort Claims

Consumer protection claims directed solely at deceptive marketing are categorically different from the tort claims before the Court, and determining whether they are precluded by federal law would require an analysis the parties have not briefed and the courts below did not reach.

The gravamen of Respondents' tort claims is that Petitioners' deception regarding the environmental impact of its products boosted fossil fuel consumption, causing an increase in greenhouse-gas emissions, which exacerbated global warming, in turn resulting in climate impacts that inflicted physical and economic injuries on Boulder. Those injuries include wildfires, floods, and drought; damage to roads, bridges, culverts, buildings, and water and stormwater infrastructure; harm to agricultural and high-elevation lands; and attendant public-health costs. The question presented is whether federal law precludes claims seeking relief for such effects of greenhouse-gas emissions.

By contrast, some state consumer protection statutes allow for an entirely different type of relief for alleged deception about the environmental

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the same litigation. However the allegations are styled, they should be precluded on identical grounds to those set forth in Petitioners' briefing and adopted by several courts across the country.").

impacts of fossil fuels. Some statutes allow for, and in some pending cases plaintiffs have demanded, injunctions prohibiting a deceptive or unfair practice, disgorgement of funds acquired as a result of the practice, statutory civil penalties for each violation of the prohibition on such practices, and an award of investigation and litigation costs.[6] None of these forms of relief is tied to increases in greenhouse-gas emissions or any resulting injuries therefrom.

To be sure, some statutory consumer protection claims do seek relief for such injuries. Where a consumer protection claim is pleaded in those terms, it may well invite the same preclusion analysis as the tort claims now before the Court. Several lower courts have so held. *See, e.g.*, *Platkin v. Exxon Mobil Corp.*, No. MER-L-001797-22, 2025 WL 604846 (N.J. Super. Ct. Law Div. Feb. 5, 2025); *City of Annapolis v. BP P.L.C.*, No. C-02-CV-21-000250, 2025 WL 588595 (Md. Cir. Ct. Jan. 23, 2025); *City of Charleston v. Brabham Oil Co.*, No. 2020-CP-10-03975, 2025 WL 2269770 (S.C. Ct. Com. Pl. Aug. 6, 2025).

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[6] *See, e.g.*, *Vt. v. Exxon Mobil Corp.*, No. 21-CV-02778 (Vt. Super. Ct. compl. filed Sept. 14, 2021) (suing under VT. STAT. ANN. tit. 9 § 2453 and seeking a permanent injunction prohibiting unfair or deceptive practices, disgorgement, statutory civil penalties, and investigative and litigation costs); *Mass. v. Exxon Mobil Corp.*, No. 19-3333 (Mass. Super. Ct. compl. filed Oct. 24, 2019) (suing under MASS. GEN. LAWS ch. 93A, §§ 1-11 and seeking declaratory relief, statutory civil penalties, and investigative and litigation costs); *Minn. v. Amer. Petroleum Inst.*, No. 62-CV-20-3837 (Minn. Dist. Ct. compl. filed June 24, 2020) (suing under MINN. STAT. §§ 325F.67, 325F.69 & 325D.44 and seeking, among other relief, a permanent injunction prohibiting deceptive trade practices, disgorgement, statutory civil penalties, and investigative and litigation costs).

However, any federal preclusion analysis of state statutory consumer protection claims requires close attention to *all* possible claims under the governing statutory provisions. Under some state consumer protection statutes, a marketing practice violates the prohibition on unfair and deceptive trade practices if it is likely to mislead consumers, offends the state's public policy favoring truthful advertising, or is immoral, unethical, oppressive, or unscrupulous. Under this standard, a plaintiff who establishes that a defendant engaged in a deceptive or unfair trade practice need not allege any additional injury and may make no reference to any additional injury in its demand for relief. In the context of lawsuits against fossil fuel companies for deception regarding the environmental impact of their products, some state statutory consumer protection claims need not rely on any allegation or demand any relief regarding injuries caused by the effects of greenhouse-gas emissions.

For example, Massachusetts prohibits "unfair or deceptive acts or practices," MASS. GEN. LAWS ch. 93A, § 2(a), and authorizes the Attorney General to seek injunctive relief and civil penalties, *id.* § 4. In keeping with that standard, the Commonwealth's complaint against Exxon Mobil alleges only that the company's marketing was deceptive, and seeks only a declaration to that effect, an injunction against the practice, and statutory penalties including civil monetary penalties and fees. *Mass. v. Exxon Mobil Corp.*, No. 19-3333 (Mass. Super. Ct. compl. filed Oct. 24, 2019). Massachusetts does not allege that the deception increased emissions or altered the climate, and it seeks neither damages for climate-related injury nor any restraint on the sale of fossil fuels.

Vermont's Consumer Protection Act is similar, VT. STAT. ANN. tit. 9 § 2453(a), and the State's complaint against Exxon Mobil seeks only an injunction, disgorgement, and statutory penalties including monetary penalties and fees. *Vt. v. Exxon Mobil Corp.*, No. 21-CV-02778 (Vt. Super. Ct. compl. filed Sept. 14, 2021).

Minnesota's consumer-fraud statute goes further still, imposing liability "whether or not any person has in fact been misled, deceived, or damaged thereby." MINN. STAT. § 325F.69, subd. 1. In keeping with that standard, the State's complaint against the American Petroleum Institute, Exxon Mobil and others seeks injunctive relief, a corrective public-education campaign, restitution, disgorgement, and civil penalties. *Minn. v. Amer. Petroleum Inst.*, No. 62-CV-20-3837 (Minn. Super. Ct. compl. filed June 24, 2020).

Claims such as these, all brought under state consumer protection statutes, do not fall within the scope of the question presented on this appeal, because they do not "seek[] relief for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate." Accordingly, the Court should decline to address such claims. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 28 (1993) (the Court "consider[s] questions not raised in the petition only in the most exceptional cases").

In denying Exxon Mobil's motion to dismiss a lawsuit brought by the State of Connecticut under that state's consumer protection statute, the trial court explained that

> The alleged actionable conduct … exclusively concerns the defendant's marketing practices. … Further, … the relief requested includes neither damages for the negative impacts of climate change, nor any restraint on the defendant's right to sell fossil fuels in Connecticut. The complaint seeks curative relief for the alleged unfair and deceptive conduct, such as the disclosure of information the defendant holds concerning climate change, injunctive relief aimed at its marketing practices, and civil penalties as authorized by [the state's unfair trade practices statute].

Conn. v. Exxon Mobil Corp., No. HHDCV206132568S, 2025 WL 3459468, at *11 (Conn. Super. Ct. Nov. 26, 2025). The court concluded that "the plaintiff's complaint seeks to regulate only the defendant's marketing conduct," not subsequent emissions by third parties. *Id.*; *see also id.* ("the fundamental objective of the lawsuit" was to "remedy the defendant's alleged unfair and deceptive marketing practices").

While affirming the district court's rejection of federal removal jurisdiction over that same case, the U.S. Court of Appeals for the Second Circuit likewise observed that "'Connecticut alleges that ExxonMobil lied to Connecticut consumers, and that these lies affected the behavior of those consumers. The fact that the alleged lies were *about* the impacts of fossil fuels on the Earth's climate' is immaterial." *Conn. v.*

Exxon Mobil Corp., 83 F.4th 122, 142 (2d Cir. 2023) (quoting *Conn v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *3 (D. Conn. June 2, 2021)) (emphasis in original). Such claims, the Second Circuit concluded, "have absolutely nothing to do with the federal common law of transboundary pollution." *Conn. v. Exxon Mobil Corp.*, 83 F.4th at 142 (quotation omitted).

Of course, defendants in other cases may argue that even these statutory consumer protection claims are precluded. But that argument would require a preclusion analysis distinct from the one briefed here—specifically, an analysis directed at the regulatory implications of prohibiting deceptive marketing directed at state consumers rather than imposing liability for injuries caused by harmful interstate and international emissions.

No court to date has confronted the distinct question of the regulatory implications of state consumer protection statutes as applied to oil companies' marketing practices. And it is far from obvious that the preclusion concerns that Petitioners argue are implicated in the present case—foreign affairs, national energy policy, and the federal regulation of interstate emissions, *see* Pet. Br. 33, 38-43—are implicated at all by a claim that does not seek to impose liability or obtain relief for injuries caused by greenhouse gases. Such a claim has no obvious impact on the regulation of emissions or energy or foreign policy; it seeks only to halt deception in trade or commerce within a state and to penalize it.[7]

B. Statutory Consumer Protection Claims Are Not Merely Repackaged Tort Claims

The suggestion that all statutory consumer protection claims are no more than repackaged tort claims is mistaken.

Petitioners and certain *amici* characterize consumer protection claims as nothing more than tort claims in disguise. Petitioners assert that "[e]ach of respondents' claims is premised on the same basic theory of liability," and that "no matter the theory of liability," the "gravamen" of the claims is "that some marginal increase in global greenhouse-gas emissions … caused them harm." Pet. Br. 8, 39. Professor Zywicki's *amicus* brief goes further, urging that "[p]laintiffs cannot plead around preclusion simply by repackaging their tort claims as [consumer-protection] claims," and that a deceptive-marketing claim's "objection sounds in tort, not consumer protection." Brief of Prof. Todd Zywicki and the Center for Individual Freedom as *Amici* in Support of Pet. at 3-4. Similarly, the American Tort Reform Association asserts that consumer protection claims "seek to achieve the same end [as tort claims]—but through the threat of civil penalties rather than ordinary

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[7] Consumer protection acts apply to deception and unfairness only in the context of commercial relations. Some statutes require that prohibited conduct occur "in connection with the sale" of consumer goods, while others more broadly encompass actions taken "in the conduct of trade or commerce." Dee Pridgen & Jolina Cuaresma, CONSUMER PROTECTION AND THE LAW § 4:11 (2024).

damages." Brief of American Tort Reform Association as *Amicus* in Support of Pet. at 10.

Some courts addressing climate suits have similarly accused plaintiffs of "artful pleading" that disguises tort claims as consumer protection claims. In affirming the dismissal of a lawsuit by the City of New York against fossil fuel companies, the Second Circuit explained that the City's lawsuit revealed a greater concern with pollution control than with consumer protection:

> The City's case hinges on the link between the release of greenhouse gases and the effect those emissions have on the environment generally (and on the City in particular). Indeed, the City does not seek any damages for the Producers' production or sale of fossil fuels that do not in turn depend on harms stemming from emissions.

City of New York v. Chevron Corp., 993 F.3d 81, 97 (2d Cir. 2021).

Read together, these statements might suggest that if the tort claims are precluded, the consumer protection claims must fall with them—i.e., "[t]he outcome should be the same, regardless of whether creative lawyers present their federal regulatory action in the form of a common law tort claim or statutory consumer protection action." Brief of American Tort Reform Association as *Amicus* in Support of Pet. at 10-11.

That suggestion is wrong.

As explained above, at least some consumer protection claims are categorically distinct from tort claims because they do not include any allegation of injury caused by greenhouse-gas emissions as an element of establishing a statutory violation or in their demands for relief. That kind of claim is not a tort claim in disguise. It is a categorically different kind of claim that requires a separate federal preclusion analysis.

Where a particular consumer protection claim seeks relief for injuries caused by greenhouse-gas emissions, it might be subject to the same or similar federal preclusion analysis as would apply to tort claims seeking relief for the same injuries. But the charge of "artful pleading" does not apply to state statutory consumer protection claims that do not impose any liability or seek any remedy for injuries caused by greenhouse-gas emissions.

The Court therefore should not treat state statutory consumer protection claims as a type of tort claim, or resolve their preclusion as a byproduct of its decision on the tort claims. Whether and when federal law precludes claims under state consumer protection statutes that do not seek relief for injuries caused by greenhouse-gas emissions is a question for a case that presents it.

CONCLUSION

This case can and should be resolved without reaching the question of whether federal law precludes state statutory consumer protection claims. The regulatory implications of such claims are distinct from those of the tort claims at issue in this case, and any preclusion analysis should be conducted on a full record and briefing in a case where a statutory consumer protection claim is actually at issue.

Respectfully submitted,

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